80-1198

Supreme Court, U. S.
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NO:

in the Supreme Court of the United States

DONALD ALAN SHAPIRO,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

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QUESTIONS PRESENTED FOR REVIEW

WHETHER A CITIZEN IS DENIED HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN HE IS SEARCHED AT AN AIRPORT SECURITY CHECKPOINT UPON UNFOUNDED SUSPICION.

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NO:

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Petition For A Writ Of Certiorari To The Supreme Court Of Florida

The Petitioner, DONALD ALAN SHAPIRO, respectfully prays that a Writ Of Certiorari issue to review the Judgment and Opinion of The Supreme Court Of Florida entered on November 13, 1980.

OPINION BELOW

The Opinion of The Supreme Court Of Florida is not as yet reported in the Southern Reporter system. It is reported at 1980 Florida Law Weekly 580. That Opinion is set forth in its entirety in Appendix A to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Rule 17 (b)(c), Supreme Court Rules. The Opinion of The Florida Supreme Court was entered on November 13, 1980. This Petition is timely filed.

PROVISIONS INVOLVED

The pertinent portion of the Fourth Amendment to the United States Constitution is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

STATEMENT OF THE CASE

The Petitioner was arrested and charged with Possession With Intent To Sell A Controlled Substance and Possession Of A Controlled Substance.

The Petitioner moved to suppress the evidence. At the Hearing on his Motion To Suppress, the following facts were presented:

> On December 29, 1977, the Petitioner arrived at the Miami International Airport with two other men, Scarborough and Krausey. After purchasing tickets, they placed placed a bag in a coin locker, the Petitioner handing the key to Krausey in a manner which attracted the attention of a Dade County Public Safety Department Detective. The detective approached the Petitioner and asked for identification. The Petitioner produced a Texas driver's license in his own name and an airline ticket in another name. The Petitioner explained the discrepancy by stating that the airline had made a mistake. As to the locker, the Defendant said Krausey had gone to a ticket counter to leave the key for a man named Dean. This was verified by the ticket agent who said she had referred Krausey to another airline. Krausey could not be located. The detective asked the Petitioner twice for consent to search his hand luggage; the Petitioner refused both requests. Although he was still suspicious, the detective concluded that he had no reason to detain the Petitioner any longer and he was permitted to leave.

> The detective and his co-worker followed the Petitioner to the security check station. The guard using the monitor testified that when the Petitioner's bag went through the X-ray monitor everything was clear except for something that looked like scissors. She drew this to the attention of her supervisor and passed the bag through again. Both security guards testified that all they observed on the screen was a pair of scissors. The detective claimed that he saw a gray mass in the center of the screen. The security supervisor asked the Petitioner if she could open the bag to check the scissors. The Petitioner consented, opened his bag, showed her the scissors and was told that he could proceed. As the Petitioner moved his bag down the table (at the checkpoint) to close it, the detective reached over, opened the suitcase further, and quickly lifted a pair of folded jeans into the air causing a bag of Cocaine concealed in the jeans leg to fall onto the floor.

Following this testimony, the Trial Court denied the Petitioner's Motion To Suppress.

The Petitioner thereupon entered a Plea of Nolo Contendere to Count I, Possession With Intent To Sell A Controlled Substance, specifically preserving his right to appeal the denial of his Motion To Suppress. Count II was abandoned by the State.

Following a Pre-Sentence Investigation, the Petitioner was sentenced to five (5) years in the State Penitentiary.

The Petitioner timely appealed to The Supreme Court Of Florida. On appeal, The Supreme Court Of Florida affirmed the ruling of the Trial Court specifically finding that probable cause is not a prerequisite to a search in an airport security boarding area and instead finding that "the portent for evil supplies the requisite Fourth Amendment reasonableness to justify the search of any person who presents himself at a boarding gate to enter an aircraft."

In the instant case, the Fourth Amendment question herein presented to this Honorable Court was raised by Motion To Suppress in the Trial Court (R. 24-25, 30-42) and was specifically addressed in the Opinion of The Florida Supreme Court herein sought to be reviewed.

REASONS FOR GRANTING THE WRIT

THE NONCONSENSUAL SEARCH OF THE PETITIONER'S LUGGAGE AT AN AIRPORT SECURITY CHECKPOINT MAY NOT BE BASED UPON MERE SUSPICION.

A. In the recent case of *Reid v. Georgia*, US , 65 L Ed.2d 890, 100 S.Ct. (1980), this Court stated that, "any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity."

In the Opinion sought to be reviewed, The Supreme Court Of Florida would not require a reasonable and articulable suspicion to support a search instead holding that "the portent for evil supplies the requisite Fourth

Amendment reasonableness to justify the search of any person who presents himself at a boarding gate to enter an aircraft."

The Petitioner would, thus, first submit that the instant Opinion of The Florida Supreme Court is in conflict with the decisions of this Court as to the standard necessary to justify police curtailment of a citizen's liberty. See, also, *Terry v. Ohio*, 392 U.S. 1 (1968).

B. The instant decision concerned a search of the Petitioner's luggage at an airport security checkpoint. The instant Opinion holds that no standard of reasonableness or suspicion is necessary to justify such a search. The Opinion holds that once a person merely appears at such a checkpoint he necessarily subjects himself to such a search without any further basis whatsoever.

The Petitioner would first like to point out that he was *not* the victim of an *administrative* search. He had *"passed"* an administrative search and was proceeding through the checkpoint when he was searched by the police detective. Whatever justification, pursuant to Title 49 §1356 U.S.C.A. (Air Transportation Security Act of 1974) may have existed for an administrative search vanished when he "passed" that administrative search. The action of the detective in the instant case was not part of an administrative search but the individual action of a police officer which, the Petitioner submits, must be guided by Fourth Amendment requirements.

In assessing the validity of searches undertaken at an airport security checkpoint, the Fifth Circuit Court of Appeals, in the case of *United States v.*

Skysworth, 482 F.2d 1272 (5th Cir. 1973) has maintained that such a search may validly be conducted on mere or unsupported suspicion.

Disagreeing with the unhindered license to search espoused by the Fifth Circuit, the Second Circuit Court Of Appeals, in *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974), the Third Circuit Court Of Appeals in *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971), and the Eighth Circuit Court Of Appeals in *United States v. Kroll*, 481 F.2d 884 (8th Cir. 1973) have all found that the mere fact that a passenger appears for boarding does not, in and of itself, justify a search of his person and his effects.

Indeed, the Ninth Circuit Court Of Appeals, in the cases of *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Miner*, 484 F.2d 1075 (9th Cir. 1973), and *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976) have gone even further. That Court has held that a passenger can prevent such a search by announcing his intention not to board the aircraft and leaving the boarding area. Under the holding of the instant case, such an action would not be possible and a citizen would be susceptible to a search even if he tried to leave the boarding area.

The Petitioner submits that the instant Opinion of The Florida Supreme Court, is in conflict with the decisions of the Second, Third, Eighth, and Ninth Courts of Appeal, and that, pursuant to Rule 17 (1)(b) this Court should take jurisdiction of this cause to resolve that conflict.

c. The Florida Supreme Court, in the instant Opinion, has announced the standard which it believes is sufficient to support an airport security search and not contravene the Fourth Amendment, to wit: mere or unsupported suspicion. The ascertainment of the proper Fourth Amendment standard required to sustain such a search is an important question of federal law which has not been, but should be settled, by this Court. The bench and bar of every state that has an airport needs the guidance of this Court in an area where conflicting decisions have produced a disjointed body of law.

CONCLUSION

The Petitioner respectfully submits that this Honorable Court should take jurisdiction of this cause for the following reasons:

1. The instant decision is in conflict with decisions of this Court as to the standard required for warrantless searches.

2. The instant Opinion is in conflict with the decision of several federal appellate courts.

3. The instant Opinion has decided an important question of federal law which has not been, but should be, settled by this Court.

Based upon the foregoing facts, arguments, and authorities, the Petitioner respectfully urges this Honorable Court to issue its Writ Of Certiorari to The Florida Supreme Court and take jurisdiction of this cause.

Respectfully submitted,

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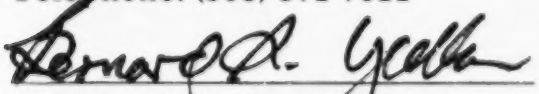

BERNARD S. YEDLIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Certiorari To The Supreme Court Of Florida was mailed this day of January, 1981, to the Office of the Attorney General: STEVEN R. JACOB, Assistant Attorney General, Florida Regional Service Center, 401 N.W. 2nd Avenue, Miami, Florida 33128.

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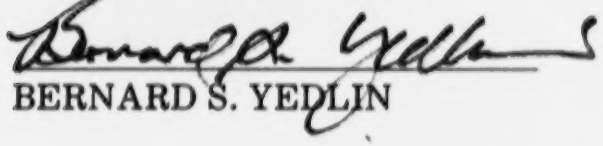

BERNARD S. YEDLIN

Appendix

SUPREME COURT OF FLORIDA

No. 54,097

DONALD ALAN SHAPIRO, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[November 13, 1980]

ALDERMAN, J.

We have for review by direct appeal Donald Shapiro's conviction for possession of cocaine. Because the trial court upheld the constitutional validity of sections 893.13 and 893.03(2)(a)(4), Florida Statutes (1977), part of the "Florida Comprehensive Drug Abuse Prevention and Control Act," we have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution (1972).

In the trial court, by motion to dismiss, Shapiro challenged the constitutionality of these statutory sections, and, by motion to suppress, he challenged the admissibility of 6.5 pounds of cocaine seized by an airport security detective from his suitcase at the security boarding area of the airport. Both motions were denied, and he then pled nolo contendere expressly reserving the right to appeal the constitutional and the suppression questions. We hold that the challenged statutes are constitutional and that the trial court's denial of the motion to suppress was proper, and we therefore affirm Shapiro's conviction and sentence.

Shapiro's constitutional attack on sections 893.13 and 893.03(2)(a)(4) is totally without merit and warrants only brief discussion. The inclusion of cocaine within the statutorily prohibited class defined in section 893.13 is not arbitrary and unreasonable, does not violate Shapiro's right to equal protection of the laws, does not render the statute overbroad, does not invade Shapiro's right of privacy, and does not violate his right to be free from cruel and unusual punishment. *Cf. Hamilton v. State*, 366 So.2d 8 (Fla. 1978), wherein we upheld the inclusion of marijuana within section 893.13 against similar constitutional challenges.

Shapiro's challenge to the trial court's order denying his motion to suppress is also without merit but warrants more extended discussion. First, we note that the trial court's conclusions of fact come to us clothed with a presumption of correctness, and, in testing the accuracy of these conclusions, we must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. *State v. Nova*, 361 So.2d 411 (Fla. 1978). In that light, the record of the motion to suppress hearing reveals the following pertinent facts. Having arrived at the Miami International Airport and having had purchased for him an airline ticket, Shapiro and two other men proceeded to the coin lockers at the airport terminal. Therein, they placed a bag. Shapiro then, in a rather suspicious manner which attracted the attention of a detective of the Dade County Public Safety Department assigned to the airport, handed the key to one of the two other men. Because of several other unusual actions by Shapiro observed by the detective for a period of at least fifteen minutes, the detective approached Shapiro and asked him for

identification. Appearing extremely nervous, Shapiro produced a driver's license in his own name and produced an airline ticket in another name. When questioned as to the discrepancy, he informed the detective that the airline had made a mistake. Fearing that Shapiro had placed an explosive device in the locker, the detective asked Shapiro whether he could search the locker. Shapiro told him that if the detective could locate the key to the locker, he could search it. The key, however, was not located. The detective also requested that Shapiro permit him to search the suitcase which Shapiro intended to carry onto the plane, but Shapiro refused. Although he was still suspicious, the detective told Shapiro that he was free to leave.

The detective then followed Shapiro down the concourse to the security boarding area of the airport. When Shapiro's suitcase was passed through the x-ray monitor, the guard at the security check station noticed something that looked like scissors. The detective, who was also watching the monitor, observed a gray mass which was approximately a foot to a foot and a half in length and eight inches in width. He requested that the bag be passed through again and that the guards take a closer look because he had a genuine fear that there was an explosive device in the suitcase. Viewing the monitor, the detective could distinguish that the mass was not clothing and that it could be plastic explosives. When the suitcase was opened by Shapiro so that the security guard could check the scissors, the detective was a bulge in a pants leg which he thought was a bomb. He, therefore, removed the pants from the suitcase. The search, however, rather than revealing the presence of a bomb, turned up the 6.5 pounds of cocaine.

The trial court, having considered the totality of the circumstances surrounding the search and seizure of the cocaine, concluded that the detective had acted reasonably.

Shapiro contends that the search and seizure violated his fourth amendment rights and that the cocaine should have been suppressed because the detective did not have sufficient probable cause to search his luggage. For several reasons, we hold that probable cause was not a prerequisite to this search in the security area of the airport, conducted for the limited purpose of discovering weapons, explosives, or other devices which could have been utilized to hijack an airplane.

In order for Shapiro to claim that his fourth amendment rights were violated, he must first establish that he had a reasonable expectation of privacy to be free from this particular intrusion by the detective. *United States v. Salvucci*, 48 U.S.L.W. 4859 (June 25, 1980); *Rakas v. Illinois*, 439 U.S. 128 (1978). A reasonable expectation of privacy under a given set of circumstances depends not only upon one's actual subjective expectation of privacy but also upon whether society is prepared to recognize this expectation as reasonable. *Smith v. Maryland*, 442 U.S. 735 (1979); *Katz v. United States*, 389 U.S. 347 (1967). Here, the defendant clearly failed to demonstrate that he had a reasonable expectation of privacy to be free from the particular intrusion involved in this case — a search for what the detective thought was a bomb. Shapiro testified that since 1971, he had boarded airplanes at least twenty times and that he was aware that there is a checkpoint at every airport where carry-on baggage must be submitted for inspection. He further testified that he had seen baggage opened

at these security stations and that he was fully aware that his could be opened. He knew that for his protection and for the protection of other air passengers, searches were conducted to prevent prospective hijackers from boarding airplanes. By his own testimony, he established that he had no subjective reasonable expectation that his baggage would not be searched.

Additionally, we conclude that even if Shapiro had some subjective expectation of privacy, society is not prepared to recognize such expectation as reasonable. At this point in time when airplane hijacking is at a crisis level, such an expectation, to be free from the limited intrusion brought about by the screening process utilized in the boarding area of the airports, is not justifiable under the circumstances. One who enters the boarding area of the airport knows or should know that he is subject to being searched for weapons or other devices which could be used for hijacking. Notices posted in front of boarding areas inform prospective air passengers that all are subject to anti-hijacking searches. These searches are not directed against individuals but rather are a part of a general screening process to avoid the carrying of weapons or explosive devices onto an aircraft.

Since Shaprio did not demonstrate that he had a reasonable expectation of privacy, the fourth amendment is not implicated, and probable cause was not requisite to justify the search.

Alternatively, assuming that Sharpiro's fourth amendment rights were implicated in this search, we find that the present search conducted for the limited purpose of preventing an airplane hijacking was proper

under the fourth amendement. Two separate concepts justify this finding.

One of the exceptions to the fourth amendment requirement of a probable cause basis for a search is a search conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). This consent must be free and unconstrained, and the question of voluntariness is a question of fact to be determined from the totality of the circumstances. *See Norman v. State*, 379 So.2d 643 (Fla. 1980). Analyzing in depth the subject of consent searches, the Supreme Court of the United States in *Schneckloth* determined that while knowledge of the right to refuse consent is a factor to be taken into account, the government need not establish such knowledge as an indispensable requisite to effective consent. The Court refused to extend the requirement of a knowing and intelligent waiver to the constitutional guarantee against unreasonable searches and seizures since, it explained, the protections of the fourth amendment have nothing to do with promoting the ascertainment of truth at a criminal trial. 412 U.S. at 241-42. *See also Interest of R.L.J.*, 336 So.2d 132 (Fla. 1st DCA 1976).

Looking to the totality of the circumstances in the present case, we find that Shapiro voluntarily consented to the search. As previously stated, he was fully aware that upon entering the security boarding area of the airport, he was subject to a security search for weapons or other devices which could be employed to hijack an airliner. He also testified that he knew he did not have to go through the checkpoint and did not have to board the plane, or that he did not have to carry this suitcase onto the plane. He willingly chose to do so and thereby

consented to the search of his person and baggage for the limited purpose of discovering weapons, explosives, or other devices which could be utilized to hijack an airplane. The fact that drugs instead of weapons were found, however, does not require their supression since the search was proper. *See Abel v. United States*, 362 U.S. 217 (1960); *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

Alternatively, even in the absence of consent, this limited security boarding area search would not have violated Shapiro's fourth amendment rights. The fourth amendment provides that the people are entitled to be secure from *unreasonable* searches and seizures. The specific content and incidents of the fourth amendment guarantee are shaped by the context in which it is asserted. *Terry v. Ohio*, 392 U.S. 1 (1968). To assess the reasonableness of security checks at airport boarding areas, we must balance the governmental interest justifying the governmental intrusion against the invasion which occurs as a result of the search. *See Dunaway v. New York*, 442 U.S. 200 (1979).

As a result of serious problems caused by airplane hijackings, the government developed screening procedures to detect potential hijackers prior to their boarding the airplane. The governmental interest in these screening procedures is to prevent the carrying of weapons or explosives aboard an aircraft and thereby to prevent jeopardy to hundreds of lives and millions of dollars of property at the hands of a lunatic, extortionist, political terrorist, or political refugee. The intrusion resulting from these procedures is minimal compared to the monumental governmental interest involved. Tragic experience has taught us that in order to protect

the prospective victims of violence, the hijacker must be discovered on the ground and before he boards the airplane. There is a very limited period of time in which the authorities can act to detect a possible hijacker. Security searches in the boarding area are the least intrusive possible because they are aimed at only those boarding the airplane and only those who could pose imminent danger to the air passengers, crew, and aircraft. Furthermore, the intrusion is minor because no stigma attaches when a person is searched at a known designated airport search point and because the person subject to the search voluntarily enters the search area and can avoid the search by not entering the boarding area. *See United States v. Skipwith. CF. United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Courts have generally held that airport security measures, such as the search in the present case, instituted to detect a prospective hijacker, are reasonable and constitutionally justified as a limited and relatively insignificant intrusion of privacy viewed against the grave necessity to protect an aircraft and its passengers and crew. *See United States v. Edwards*, 498 F.2d 496 (2d Cir. 19740) *United States v. Cyzewski*, 484 F.2d 509, 512 (5th Cir. 1973), *cert. dismissed, Cyzewski v. United States*, 415 U.S. 902 (1974); *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973), *cert. dismissed, Moreno v. United States*, 414 U.S. 840 (1973).

In *United States v. Skipwith*, the United States Circuit Court of Appeals, Fifth Circuit, held that the nonprobable cause search of Skipwith, who had presented himself for boarding at the Eastern Air Lines boarding gate at the Tampa International Airport, was lawful and that the contraband uncovered by the search was

properly admitted into evidence. Initially, the Court pointed out that Skipwith knew or should have known that he was subject to being searched after presenting himself in the boarding area and explained:

> His only reason for being there had to be to board the aircraft. Because of the widespread publicity given to the government's efforts to cope with the piracy of aircraft, it was general knowledge that citizens boarding planes were subject to special scrutiny and to weapon searches . . . [T]he officer did not go to Skipwith and stop and search him at a point where such a procedure was extra-ordinary or unexpected. Rather, Skipwith came to the specific part of the airport where he knew or should have known all citizens were subject to being searched.

482 F.2d at 1274. Employing a test of reasonableness in upholding the search of Skipwith, the Fifth Circuit emphasized that "reasonableness" requires courts to weigh more than the necessity of the search in terms of possible harm to the public. Courts must also take into account the likelihood that the search procedure will be efficacious in averting the potential harm. It stated that balanced against public necessity and efficacy of the search are the degree and nature of intrusion into the privacy of the person and effects of the citizens which the search entails. Weighing these three factors determinative of reasonableness, the Fifth Circuit acknowledged the necessity to ensure that the potential harms of air piracy are foiled and found that the airport boarding area search procedures have every indicia of being the most efficacious possible. Although recognizing

that the intrusion may be inconvenient and annoying, the Fifth Circuit held that this particular type of search was less offensive to the searched person than similar searches in other contexts and that the circumstances under which these searches were conducted made abuses much less likely to occur. The court explained:

> Unlike searches conducted on dark and lonely streets at night where often the officer and the subject are the only witnesses, these searches are made under supervision and not far from the scrutiny of the traveling public. Moreover, the airlines, which have their representatives present, have a definite and substantial interest in assuring that their passengers are not unnecessarily harassed. The officers conducting the search under these circumstances are much more likely to be solicitous of the Fourth Amendment rights of the traveling public than in more isolated, unsupervised surroundings.

482 F.2d at 1276.

The Fifth Circuit rejected Skipwith's argument that even if a weapon discovered during his search could have been introduced into evidence, the cocaine seized should have been excluded since the search was not and could not properly have been conducted for the purpose of discovering illicit drugs and stated:

> The strictures of the Fourth Amendment protect the citizen from unwarranted and unreasonable intrusion by the government on his person or into his effects. The rule excluding the admission

of illegally obtained evidence was designed to effectuate this purpose by removing the principal incentive to conduct illegal searches. The rule does not exist because the evidence is not probative, or to chastise errant law officers, or to benefit the accused.

[I]t is important to note that the imposition which must be considered is the intrusion on a citizen's right to be free of unreasonable searches, not upon any right to be free of criminal prosecution. Certainly the imposition of a criminal penalty for possession of drugs found during an airport search will burden the one on whom it is imposed; constitutionally speaking, however, he has suffered only the same intrusion as other passengers who were searched. Although the discovery of cocaine in a search for weapons may be unexpected by the government, there is nothing in the Constitution that gives the apprehended felon a right to complain because the product of the protective action was not anticipated. Such a result cannot properly be classified as a windfall. It is the product of valid police work. The government has no duty to catch a carrier of dope sportingly or according to any game book rule. Nor is it material whether the circumstances leading to the discovery of the cocaine were of the defendant's making; *all that matters is that the search be legally conducted.*

482 F.2d at 1277-78 (emphasis added).

We hold that these searches are reasonable if conducted solely for the purpose of discovering whether a prospective air passenger poses an immediate threat to air commerce. Although the initiating purpose of the search is limited to the detection of a would-be hijacker, the search may be extensive because the airplane hijacker's weaponry could be any of a number of easily concealed things including plastic explosives or gasoline. The fact that an object was not metal and therefore did not set off the magnetometer at the security boarding station does not mean the search must end at that point. *See United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), *cert. denied, Bell v. United States*, 409 U.S. 991 (1972). So long as the object of the search is prevention of an airplane hijacking, the search is reasonable and proper and does not require probable cause for its foundation. But, as Judge Clark said in *United States v. Skipwith:*

> [c]ertainly all citizens look forward to the day when skyjackings and their sequels, airport search and security measures, cease. When the threat of air piracy disappears the standards of reasonableness which we here recognize will go with it. Until that time arrives, however, the portent for evil supplies the requisite Fourth Amendment reasonableness to justify the search of any person who presents himself at a boarding gate to enter an aircraft.

482 F.2d at 1279.

In view of our holding that probable cause was not a prerequisite to this limited search in the security boarding area of the airport, we need not reach the

question of whether, under the facts of this case, the detective actually had probable cause to search.

Accordingly, we hold that section 893.13 and section 893.03(2)(a)(4) are constitutional. We further hold that the trial court properly denied Shapiro's motion to suppress evidence found as a result of a search by a detective of the Dade County Safety Department initiated to ensure that Shapiro was not a prospective airplane hijacker. When a valid "hijack" search takes place, evidence of another crime discovered during the search is admissible. The judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON and McDONALD, JJ., Concur ADKINS, J., Dissents with an opinion with which ENGLAND, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ADKINS, J., Dissenting.

The facts are not disputed. I disagree with the conclusions of law made by the trial judge and by the majority opinion here. Inasmuch as I believe the motion to suppress should have been granted, I decline to reach the constitutionality of the statutes. *Singletary v. State*, 322 So.2d 551 (Fla. 1975).

As with virtually all search and seizure issues, the factual circumstances are of utmost importance. Viewed in the light most favorable to the state, *State v. Nova*,

361 So.2d 411 (Fla. 1978), the record from the hearing on the motion to suppress reveals the following facts.

On December 29, 1977, the appellant (hereinafter referred to as the defendant) arrived at the Miami International Airport with two other men, Scarborough and Krausey. After purchasing tickets, the defendant either helped or actually placed a bag in a coin-locker, then gave a key to Krausey in a manner which attracted the attention of a detective of the Dade County Public Safety Department's Organized Crime and Narcotics Section. The detective approached the defendant and asked for identification, whereupon the defendant produced a Texas driver's license in his own name and an airline ticket in another. When questioned about the discrepancy, the defendant became nervous and said the airlines made a mistake. As to the locker, the defendant said Krausey had gone to a ticket counter to leave the key for a man named Dean. This was verified by the ticket agent who said she had referred Krausey to another airline. Krausey could not be located. The detective asked the defendant twice for consent to search his hand luggage; the defendant refused both requests. By this time the detective felt that the defendant exhibited many characteristics of the so-called drug-courier and hijacker profiles. *See United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). The bare fact that one fits a profile does not provide a reasonable basis for an investigative detention. *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978). Concluding that they had no reason to detain the defendant any longer, the officers permitted him to leave.

The detective and his co-worker followed the defendant to the security check station. The guard viewing the monitor testified that when the defendant's bag went through, everything was clear except for something that looked like scissors. She drew this to the attention of her supervisor and passed the bag through again. Both security guards testified that all they observed on the screen was a pair of scissors. The detective claimed he saw a grey mass in the center of the screen. The supervisor asked the defendant if she could open the bag to check the scissors. The defendant consented, opened his bag, showed her the scissors and was told he could proceed. As the defendant moved his bag down the table to close it, the detective reached over, opened the suitcase further, and quickly lifted a pair of folded jeans causing a bag of cocaine to drop to the floor.

Airport searches have received considerable attention since the late 1960's because of the frequency of skyjacking, which posed a severe threat to public safety. *See e.g. United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *United States v. Lopez*, 328 F. Supp. 1077 (E.D. N.Y. 1971). This menace engendered the development of screening procedures to detect potential hijackers prior to boarding the aircraft. *See* 3 W.R. LaFave *Search & Seizure, A Treatise on the Fourth Amendment*, section 10.6(a) – (g) at 327-56 (1979). Under the current system all persons entering the boarding area and their effects are mechanically checked. A practical ramification of this 100% screening process is that persons with contraband in their carry-on luggage may be apprehended. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). Care must be taken to see that these routine airport inspections do not become vehicles

by which otherwise impermissible searches and seizures are validated.

In the case at bar, the detectives were on duty as organized crime and narcotics officers. They admittedly did not have probable cause to arrest or search the defendant after the initial encounter in the terminal area. They followed him to the screening area. One detective admonished the security guard to check defendant's bag carefully. He also positioned himself to view the monitor as the bag passed through. The defendant had been cleared by the security guards when the detective reached for the blue jeans in the partially-opened suitcase. The detective's testimony that he saw a gray mass on the X-ray monitor and feared an explosive device is untenable in light of his expertise and his actions. *Cf. United States v. Scott*, 406 F. Supp. 443 (E.D. Mich. 1976). Seizing the clothing so as to cause the concealed item to drop to the floor is not consistent with the caution one should exhibit in the presence of a putative bomb.

The officer's conduct must be gauged by established Fourth Amendment principles. A warrantless seizure of the jeans clearly occurred. At no time did the defendant consent to a search by the detective. *Cf. Myles v. State*, 374 So.2d 83 (Fla. 3d DCA 1979); *Husted v. State*, 370 So.2d 853 (3d DCA 1979). No contraband was in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The defendant was in the process of closing his bag when the officer reached in; there was no evidence that the bulge represented an immediately accessible weapon. *McNamara v. State*, 357 So.2d 410 (Fla. 1978).

The state contends that the detective's knowledge of the immediately preceding events gave him a "founded suspicion" that the bag contained a weapon or explosive and that this justified the seizure pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Supreme Court applied a balancing test to justify an officer's detention and "frisk" or "pat-down" of a defendant's person for a weapon upon less than the traditional probable cause standard. The Court weighed the danger to the officer against the degree of intrusion involved in a pat-down type search. *Terry* is inapplicable to the case at bar. The officer did not testify he believed the defendant was armed or presently dangerous except that there might be a bomb, in which case his actions only increased the danger. There is no reason to judge his conduct by less than a probable cause to search standard. Applying that standard to the instant facts, I find no support for a warrantless seizure of the defendent's clothing. All this officer knew was that the defendant fit a profile, he was nervous, and a grey mass appeared on the monitor. Neither of the trained security guards saw the grey mass and the defendant cleared airport security. At most, the officer had a suspicion that something was amiss. *State v. Stevens*, 354 So.2d 1244 (Fla. 4th DCA 1978).

The trial court did not enter a written order denying the motion to suppress. The ruling consisted of the following:

> The Court: I say, in this issue, as in the case of most issues, the law of common sense is the prevailing one.

> It would be, I think, to disregard common sense to hold that a reasonable person in this officer's position, knowing what this officer knew, did not have reasonable grounds to believe, as a man of reasonable cause of action [sic.]., that an offense had been committed.
>
> Therefore, I will deny the motion to suppress.

This is the appropriate standard for ascertaining the validity of a warrantless *arrest*, not a warrantless *seizure*. *See State v. Doe*, 115 N.H. 682, 371 A.2d 167 (1975).

The sentence should be vacated, the conviction reversed, and the cause remanded to the trial court for further proceedings.

ENGLAND J. Concurs

An Appeal from the Circuit Court in and for
Dade County,
Alan R. Schwartz, Judge — Case No. 77-35055

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